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QUESTION, PROFESSOR CHODOSH: That was quite excellent. Let me just open up the questions. You talked about the unique intrafamiliar quality of the U.S./Canadian relationship and the reluctance to resort to third party settlement given that relationship. How does that strike you as we look south, as we look to forming trade relationships with an increasing number of Central and South American countries? Will that mean we have to turn increasingly toward third party settlement dispute resolution? This question is really for both of you. Is there a need for alternatives that fall somewhere between the models of direct negotiations and arbitration or adjudication by outsiders?

ANSWER, MR. LEGAULT: I think that the dispute settlement mechanisms in the FTA and NAFTA are extraordinary. I think they have been immensely helpful and especially creative. Chapter 19 of the FTA, I guess it is still Chapter 19 of NAFTA, is the system for resolving disputes arising out of the application of one country's trade remedy of law against the other. I see that whole area both in the NAFTA and in a wider free trade agreement of the Americas as very much a growth industry. I think that is a very, very positive development. I do not hold quite as much grief for negotiations above all other avenues as Davis has, although I do think, generally, that is the way to go.

In the special area of trade, what has been needed for so long and what we were able to obtain thanks to the kind of farsightedness and vision of Mr. Macdonald, is the realization this is an area that has to be based on rules. Rules have to be respected, and you need a system of adjudicating precisely whether or not those rules are being applied and respected on both sides.

More generally, outside the field of trade I think the World Court is something that we ought to be a little less reluctant to use then we often are. It is true that it is a Byzantine world you enter when you get there. It is true that it can be a very expensive proposition. Do not ask either Davis or me what we spent on our *Gulf of Maine* case, but I remember what Paul Martin used to say: "It is not an unfriendly act." This is a proper use of one of the great world institutions, when you go to the World Court. So, can we find other specialized institutions that could be useful to Canada and the United States more widely? Frankly, I think as far as my limited vision reaches at any rate, we have about covered the ground with an organization like the International Joint Commission (IJC) and the dispute settlement measures

provisions of NAFTA and the FTA. How many of our disputes after all revolve around trade? I would say at least ninety-five percent of them do. The other five percent is about water and the environment.

ANSWER, MR. ROBINSON: I think it should be fairly rare that we send a dispute to resolution by non-citizens, in effect by foreigners, because we have such highly developed legal systems. We have all kinds of very good mechanisms. So to me, reference to third party dispute resolution, is a matter of having sufficient internal legal resources in terms of your own nationals that can help you to deal with these things.

I would say that in a lot of the Latin American nations, a number have very highly developed legal systems. It is in the cases where you are dealing with either issues or parts of the world that do not have the benefits and the luxuries that we have that it makes much more sense, of course, to end up in any kind of a body that is going to help solve the problem. But I would be, in my case, much more hesitant in the U.S./Canada/Mexico relationship, for example, to think that we would need to have recourse to others than Americans, Mexicans, and Canadians to solve those problems. It should only be in a very, very rare instance.

The other thing that I will mention is one of the problems regarding the third party dispute, is that you feel like you have to throw in everything and the kitchen sink, because if you do not, someone is going to be after you at the end of the case. If you have gone through the World Court, for instance, internal pressures became so enormous that there was no other option, each of the governments feels pressured to throw in everything they can or else they are going to be politically criticized. So it becomes an enormous undertaking. The U.S. team, and I think it was similar on your side, had 100 professionals involved in the case. We had to leave no stone unturned. The research, writing, costs, expenses, and disruption of officials' other responsibilities, is huge. We were still legal advisors of the Foreign Ministries. This was an enormous case.

It is a major, major personal responsibility that you undertake if you are going to be in charge of one of these matters. How are you going to find the hours to deal with Iranians, Nicaraguans, Russians, Chinese, and whoever else it is? It is not something lightly undertaken.

QUESTION, MR. FITZ-JAMES: I have a question for Mr. Legault. I was intrigued to hear that this arbitral remedy exists under the Treaty. This has not been used in ninety years. The immediate question is, why?

ANASWER, MR. LEGAULT: The answer is the same as the answer to the question, why hasn't the United States gone to the World Court more often? It requires the advice and consent of the U.S. Senate to invoke that article.

QUESTION, MR. FITZ-JAMES: It is political, is it not?

ANSWER, MR. LEGAULT: It is political will. It is reluctance of the U.S. Senate and, perhaps, a broad segment of the U.S. population. Certainly, it is reluctance on the part of the U.S. Senate to surrender what they see as sovereignty. They do not like to have foreigners determining disputes which they think the United States in its own sovereign right and wisdom is far better equipped to settle itself.

COMMENT, MR. ROBINSON: I think I should add a bit on that. It is really under the Constitution of the United States. You may recall that after the Second World War there was a huge dispute over what was called the Bricker Amendment to the Constitution.[1] There has been great fear among certain segments of the political establishment in the United States that somehow the United States would be handing over to an outside body the determination of issues meant for either the President or Congress. Therefore, there has always been a rather large intellectual debate and concern about whether, if at any time by an act of Congress and the President, we would be handing over to another body something that was not supposed to be in the hands of that other body under the Constitution.

We are finding that idea is alive and well even today. There would be all kinds of difficulties. The Law of the Sea Convention, which still has not been ratified, I just find unbelievable. The defense establishment in the United States is 100% behind the Law of the Sea Convention, but Senator Helms, in his wisdom, has not even held hearings about it. I cannot explain entirely why, and I do not entirely disagree with him. On many issues, I think the man makes an enormous amount of sense, but on this issue, I do not know why he is delaying things. I can only assume, he has the same kind of concern which is still a very, very major concern under the U.S. Constitution.

QUESTION, PROFESSOR KING: I had a question for Len – what about the Pacific Salmon controversy?[2] Does that lend itself to an approach through the International Joint Commission?

ANSWER, MR. LEGAULT: Yes, very much so. Indeed, the two governments considered giving it to the Joint Commission at one time. The reason I was given publicly, and for which I would have cheerfully throttled somebody, was that the slow-moving IJC could not get around to resolving

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[1] Named after Senator John W. Bricker. For a comprehensive explanation of the Bricker Amendment, *see* LOCH K. JOHNSON, THE MAKING OF INTERNATIONAL AGREEMENTS 85-115 (1984).

[2] *See* Tom Kenworthy and Steven Pearlstein, *U.S., Canada Reach Pact on Pacific Salmon Fishing*, WASH. POST, June 4, 1999, at A17.

it. This time the government had been piddling with it for eight years and the slow-moving IJC was excluded.

I think the Commission could have handled that fine. It would have been a bit of a poison gift. I happen to know of the case well. I might have had to excuse myself from it because I had been involved in negotiations in various times over the years. This is the kind of issue that the Commission can, and I believe should, be assigned from time to time.

COMMENT, PROFESSOR CHODOSH: Once again, Henry has led us to a discussion about fish, so with that, I release you for lunch. Thank you again for your sharing your experiences.